IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6352 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GULABKHAN KALEKHAN NAGORI

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 25/01/2000

ORAL JUDGEMENT

Heard learned advocate Ms. S. G. Patel on behalf of the petitioner and learned A.G.P. Mr. A. J. Desai for the respondents Nos. 1, 2 and 3.

1. The detention order dated 17.5.1999 passed by the respondent No. 2 - District Magistrate, Banaskantha against the petitioner in exercise of powers conferred under Section 3(1) of the Gujarat Prevention of Antisocial Activities Act, 1985 ("PASA" for short) is challenged in the present petition filed under Article 226 of the Constitution of India.

2. The grounds of detention served upon to the detenu under Section 9(1) of "PASA" Act, copy of which is produced at Annexure "B" Page - 18, inter-alia indicate that six prohibition cases were registered against the detenu at Palanpur City Police Station in between 26.8.1998 to 14.1.1999. That in each case country made liquor was seized from the possession of the petitioner. Out of the six cases, first four cases are pending trial in the Court, while remaining two cases are pending investigation.

Over and above that, on assurance of their anonymity two witnesses have given statement dated 6.4.1999 against the alleged antisocial activities of the petitioner, relating to incident dated 15.3.1999 and 29.3.1999 respectively. That two other witnesses have also given statements on 24.4.1999 relating to incident dated 6.3.1999 and 10.4.1999 respectively.

3. That in consideration of the aforesaid material, the respondent No. 2 as Detaining Authority has come to the conclusion that the petitioner is a "bootlegger" within the meaning of Section 2(b) of "PASA". That enforcement of general provisions of law being insufficient to prevent the petitioner from continuing his bootlegging activities, and thereby in order to prevent the petitioner from continuing his such activities, the impugned order has been passed.

4. The petitioner has challenged the impugned order on numerous grounds. It has been contended at the Bar on behalf of the petitioner that the impugned order is bad in law on account of non application of mind in as much as the Detaining Authority has failed to consider the aspect of less drastic remedy like cancellation of bail, though available under Section 437(5) of Cr. P.C.

5. It is noteworthy that in the matter of ZUBEDABIBI RASIDKHAN PATHAN VS. STATE OF GUJARAT reported in 1995(2) G.L.R. 1134, the Division Bench of this Court has expressed the view that non consideration of less drastic remedy available under Section 437(5) of the Cr.

P. C. to claim cancellation of bail amounts to non application of mind which vitiates the subjective satisfaction rendering the detention order bad in law. That the said view has been approved and endorsed in the proceeding of Letters Patent Appeal No. 1056 of 1999 decided on 15.9.1999 by this Court (Coram : C. K. Thakkar & A.L. Dave, JJ.)

6. On scrutiny of grounds of detention, it appears that the Detaining Authority has observed that in each of the prohibition cases registered against the petitioner, the petitioner has been released on conditional bail by the Competent Court. However, the grounds does not disclose any fact from which it would be inferred that the Detaining Authority has ever considered the aspect of claiming cancellation of bail as available under Section 437(5) of the Cr. P. C. Under the circumstances, on account of the said non application of mind, it is difficult to up-hold the impugned order.

7. As the petition succeeds on the aforesaid ground alone, it is not necessary to consider and decide, the other contentions raised in the petition.

8. On the basis of the aforesaid discussion, the petition is allowed. The order of detention dated 17.5.1999 passed by the respondent No. 2 - the District Magistrate, Banaskantha, Palanpur against the petitioner-detenu is hereby quashed and set aside. The petitioner-detenu - Gulabkhan Kalekhan Nagori is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute to that extent.

Date : 25.01.2000. (A. K. Trivedi, J.)

PALLAV.